No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR,
Petitioner,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs
Respondent.

On Writ Of Certiorari
To The Court of Appeals For The Federal Circuit

BRIEF OF PROFESSORS OF ADMINISTRATIVE LAW AND FEDERAL REGULATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

SAMUEL ESTREICHER
NYU SCHOOL OF LAW
40 Washington Sq. So.
New York, NY 10012
(212) 998-6226

DAVID L. NOLL
RUTGERS LAW SCHOOL
123 Washington St., 303C
Newark, NJ 07102

VINCENT LEVY
Counsel of Record
DANIEL M. SULLIVAN
GREGORY DUBINSKY
EVAN H. STEIN
HOLWELL SHUSTER
& GOLDBERG LLP
425 Lexington Avenue
New York, NY 10017
(646) 837-5151
vlevy@hsgllp.com

Counsel for Amici Curiae

January 31, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

Amici are professors of law who teach and write in the fields of administrative law and federal regulation. They have an interest in how the Court's decision will affect administrative law. *Amici* have different views as to whether *Auer* and *Seminole Rock* were correctly decided. Some of the *Amici* believe these cases were correct, and others believe they were not. All *Amici* believe, however, that the deference regimes prescribed by *Auer/Seminole Rock*, on the one hand, and *Chevron*, on the other, rest on wholly different foundations. Further, *Amici* submit that, regardless of whether *Auer* and *Seminole Rock* are overruled or narrowed, *Chevron* is, and should remain, good law. A complete list of *Amici* is provided in Appendix A.

SUMMARY OF THE ARGUMENT

In this case, the Court considers whether to overrule *Auer* v. *Robbins*, 519 U.S. 452 (1997), and its antecedent, *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). That line of cases involves a particular form of deference to agency action—specifically, deference to an agency's interpretation of its own regulation. In seeking certiorari, however, Petitioner argued that "[r]evisiting *Auer* deference [would be] an appropriate place to begin" a more complete "reconsideration" of "existing doctrines of agency deference," including under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Pet. 11.

---

[1] Respondent has filed blanket consent to the filing of *amicus* briefs, and Petitioner, who was notified of our intent to file this brief, consented to its filing. No counsel for a party authored this brief in whole or in part, and no person other than *Amici*'s counsel made a monetary contribution to fund the preparation or submission of this brief.

Amici do not address whether *Auer* should be overruled. Rather, *Amici* respectfully submit that, in considering the continuing viability of *Auer*, the Court should not lose sight of the fact that *Auer* and *Seminole Rock* rest on very different conceptual and legal foundations than does *Chevron*. Furthermore, *Chevron*, properly understood, does not implicate the separation-of-powers questions Petitioner raises about *Auer*, and it rests on a different historical pedigree than *Auer*. Reconsidering *Auer* is not, and should not be, a "first step" to reconsidering *Chevron*. The two doctrines are fundamentally distinct, and *Chevron* deference remains appropriate even if *Auer* deference to an agency's interpretation of its own regulations is reconsidered. Indeed, after having petitioned the Court on the notion that it would be wise to revisit all deference doctrines, Petitioner in its merits brief now seems to acknowledge that the two doctrines are indeed distinct, asserting that "*Chevron* deference confirms the flaws of *Auer* deference." Brief for Petitioner 45–47.

Indeed, it would be a mistake to lay at *Chevron*'s door whatever problems the Court may have with *Auer*. The *Chevron* line of cases acknowledges that Congress, in crafting complex regulatory statutes, may lawfully create a statutory "space" within which an agency may promulgate binding policy via statutorily prescribed procedures. By contrast, *Auer* addresses the deference owed to an agency's interpretation of its own ambiguous regulations. Put another way, *Chevron* is about Congress's delegation of subsidiary policymaking authority, whereas *Auer* is about how best to interpret a legal instrument—the agency's regulation. *Auer* therefore has nothing to say on the matter *Chevron* addresses.

ARGUMENT

I. *Chevron* and *Auer* Are Fundamentally Distinct Doctrines Designed To Address Different Legal Questions.

A. In *Chevron*, this Court explained the rationale for deferring to a properly promulgated agency regulation: Congress "left a gap for the agency to fill," and there is an "express" or "implicit" delegation of authority to the agency "to elucidate a specific provision of the statute by regulation." 467 U.S. at 843–44. Synthesizing the doctrine further in *United States* v. *Mead Corp.*, the Court explained that *Chevron* deference is triggered only if it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." 533 U.S. 218, 229 (2001). The *Chevron* principle thus recognizes that in appropriate cases Congress may task an agency with "the formulation of subsidiary administrative policy within the prescribed statutory framework." *Yakus* v. *United States*, 321 U.S. 414, 425 (1944).

The specific administrative-law question the *Chevron* doctrine addresses is this: When an agency promulgates a regulation (or issues an order) interpreting a statute it is charged with administering pursuant to an express or implicit delegation from Congress, has the agency stayed within the bounds Congress set, or has the agency strayed beyond congressionally prescribed limits? Deference is due only if, and precisely because, the Court concludes that Congress left space for the agency to promulgate binding policy and the agency's determination is not unreason-

able. *See* Peter L. Strauss, *"Deference" Is Too Confusing-Let's Call Them "Chevron Space" and "Skidmore Weight,"* 112 Colum. L. Rev. 1143, 1145 (2012) ("'*Chevron* space' denotes the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—that is, its delegated or allocated authority.").

It is only upon verifying that Congress has made such an allocation—and that the agency has followed required procedures and acted reasonably—that the Court has deferred to the agency's determination. Consider *Chevron* itself, which evaluated an EPA regulation defining the statutory term "stationary source." 467 U.S. at 842. The Court concluded that because Congress had not "commanded" a single definition of what constituted an emitting source, the agency was empowered to make a binding policy decision (*i.e.*, whether to adopt a plant-wide definition) in the interstices of the statute. *Id.* Deference was due because the statute left space for the agency's "subsidiary administrative policy" determination. *See id.* In *Mead*, by contrast, the Court declined to apply *Chevron* deference to a tariff classification ruling by the United States Customs Service because Congress had not "intended such a ruling to carry the force of law." 533 U.S. at 221.

Those results and the underlying reasoning are sound. If there has been a delegation of policymaking authority to an agency, this Court has correctly held, "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue

and the agency's interpretation is reasonable." *Id.* at 229 (citations omitted). This is simply another way of saying that, in this circumstance, the judicial function of declaring "what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), is limited to ascertaining whether the agency has strayed beyond the scope of the delegation set by Congress. See Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 26 (1983) ("Judicial deference to agency 'interpretation' of law is simply one way of recognizing a delegation of law-making authority to an agency." (emphasis omitted)); Strauss, *supra*, at 1145 ("Courts are, of course, ultimately responsible for deciding questions of law, but one such question is: "How much authority has validly been allocated to this agency?").

On the other hand, if there has been *no* delegation of policymaking authority to the agency, then it follows that there is no basis for deference (beyond whatever respectful consideration of the agency's views is appropriate under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)). In that circumstance, the court's duty to "say what the law is," *Marbury*, 5 U.S. (1 Cranch) at 177, does not entail a duty to defer to the agency's interpretation of the statute, because the agency was not empowered to, and did not, make any pronouncement having legal force within a "space" reserved to the agency by Congress. Strauss, *supra*, at 1145.

The short of the matter is that *Chevron* deference faithfully fulfills the judicial task in administrative-law cases that implicate the meaning of an agency's organic statute. If a court determines that an agency has been given policymaking authority within certain bounds set by statute, including acting through the required procedures, then the only question for the court is whether the agency has stayed within the bounds

set by Congress. The court answers that question by determining whether the agency's course of conduct is consistent with the statute and otherwise reasonable. If, on the other hand, there has been no delegation of policymaking authority, then the court owes the agency no deference under *Chevron*.

B. *Auer* deference is designed to address an altogether different question and rests on an entirely different foundation. A court applying *Auer* deference does not address the *Chevron* question—whether the agency has acted within the scope of authority set by Congress. Rather, *Auer* deference is meant to assist the court in determining the meaning of a regulation promulgated by the agency when that regulation is deemed ambiguous.

In the *Auer* context, the agency is the creator of the regulation and thus presumably has familiarity with the practical issues the regulation is meant to address. In *Seminole Rock*, *Auer*'s antecedent case, the Court emphasized that, in discerning what the agency meant its regulation to accomplish, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414; *see* Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 Emory L.J. 47 (2015).

Thus, the rationale for what later became *Auer* deference has nothing to do with determining the meaning of legislation, or with whether the agency has kept within the bounds of a statutory delegation. The question in the *Seminole Rock*/*Auer* context is simply whether an agency's interpretation of its own regulation is entitled to "controlling weight."

Amici will not trace the development of the doctrine from *Seminole Rock* to *Auer*—leaving that to the parties and their *amici*. Nor will *Amici* address the question whether, or in what circumstances, it is appropriate to give an agency interpretation of a regulation "controlling weight."[2] Suffice it to say, however, that "*Auer* is not a logical corollary to *Chevron*." *Decker* v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part). Instead, the two doctrines are designed to address different administrative-law questions, and they rest on distinct legal and analytical foundations.

II. *Chevron* and *Auer* Do Not Raise The Same Statutory And Constitutional Questions.

Petitioner has suggested that this case should be the starting point for reexamining not just *Auer* and *Seminole Rock*, but also other deference doctrines, including *Chevron*. Pet. 11. *Amici* disagree that *Chevron* warrants reconsideration, or that these two deference doctrines have much, if anything, to do with one another as a conceptual matter. In any event, the charges that petitioner levels against *Auer* cannot be leveled against *Chevron*.

A. Citing several members of this Court, Petitioner argues that "*Auer* deference provides agencies an end-run around the notice-and-comment procedures," including by incentivizing agencies to speak

---

[2] Nonetheless, *Amici* believe that, if this Court overrules *Auer*, an agency's interpretation of its regulation should be evaluated by means of the factors set forth in *Skidmore*—"the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140.

ambiguously. Pet. 15 (citing *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J.); *Garco Constr., Inc.* v. *Speer*, 138 S. Ct. 1052, 1053 (2018) (Thomas, J., dissenting from denial of certiorari)); *see also* Brief for Petitioner 28–36, 37–40 (arguing that *Auer* is incompatible with the APA's notice-and-comment procedures, and the related jurisprudence on interpretive rules, and policy reasons behind both).

Whatever the merit of this attack upon *Auer*, the same charge cannot be levied at *Chevron*. Indeed, if anything, the incentives created by *Chevron* and *Auer* are opposite. *Accord* Brief for Petitioner 46 ("*Chevron* deference therefore promotes, rather than skirts, notice-and-comment rulemaking").

Indeed, this Court's decision in *Christensen* v. *Harris County* makes the distinction quite clear. 529 U.S. 576 (2000). There, the government argued that the Court should "defer to the Department of Labor's opinion letter" as to the meaning of the Fair Labor Standards Act and the meaning of a regulation promulgated by the Department of Labor. *Id.* at 586, 588. The Court declined to accord *Chevron* deference to "an interpretation" of the statute "contained in an opinion letter," distinguishing the letter from an agency interpretation "arrived at after, for example, a formal adjudication or notice-and-comment rulemaking." *Id.* at 587. "Interpretations" contained in documents "lack[ing] the force of law," the Court held, "do not warrant *Chevron*-style deference." *Id.* Agencies only receive *Chevron* deference if they follow statutorily prescribed procedures for making binding statements of subsidiary administrative policy—that is, statements that carry "the force of law." *Id.* Thus, *Chevron* gives agencies every incentive not to skirt those procedures.

By contrast, the Court declined to defer under *Auer* to the letter's interpretation of the regulation, but not because the agency's pronouncement lacked the force of law. Rather, since even agency texts that do not carry the force of law may receive *Auer* deference, the Court relied on its determination that "[t]he regulation" at issue was "not ambiguous." *Id.* at 588. Had the regulation at issue been ambiguous, then—and assuming the opinion letter's interpretation was not "plainly erroneous or inconsistent with the regulation," *Auer*, 519 U.S. at 461—*Auer* deference would have been appropriate. Thus, *Auer* permits deference to informal agency interpretations which, because of their informality, would not receive deference under *Chevron*.

B. Petitioner's next attack upon the *Auer* doctrine is that it violates the separation of powers. Brief for Petitioner 43–45. Without taking a view on whether *Auer* deference contravenes the separation of powers, *Chevron* deference, appropriately applied, plainly does not.

To begin, *Chevron* does not offend Article I of the Constitution. Article I, as reflected in the non-delegation doctrine, requires that "when Congress confers decisionmaking authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman* v. *Am. Trucking Ass'cs*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928)). If an organic statute meets that test, then there is no occasion to question on delegation grounds an exercise of agency authority under a properly drawn delegating statute. And the operation of *Chevron* itself is perfectly consistent with longstanding non-delegation doctrine. *Yakus*, 321 U.S. at 424 ("The

Constitution . . . does not require that Congress . . . make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.").

Nor does *Chevron* offend Article III's prescription that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. When a court concludes that Congress has delegated authority to an agency to make administrative policy within prescribed statutory limits, the court decides what those limits are and whether the agency has strayed beyond them. *Cf.* Brief for Petitioner 27 (asserting that *Auer* violates the APA's prescriptions relating to the judicial review of agency regulations).

Relatedly, Petitioner asserts that *Auer* deference should be revisited because it contravenes the "'fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands.'" Brief for Petitioner 45 (quoting *Decker*, 568 U.S. at 619 (Scalia, J., concurring in part and dissenting in part)); see also Pet. 17–18 (same).

But for similar reasons, this attack makes no headway against *Chevron*. That is, *Chevron* addresses how to discern the meaning of a federal statute passed by Congress and signed by the President. And the Court is the body that decides the ultimate question under *Chevron*—whether the agency has stayed within its statutory limits. The Court performs that task by considering what the federal law provides, evaluating whether there has been a delegation of authority, and then, by reviewing what the agency has

done, deciding whether the agency acted within the scope of delegated authority. *Chevron* thus entails no erosion of the judicial function.

III. *Chevron* and *Auer* Have Different Historical Pedigrees and Implicate Different Stare Decisis Considerations.

We end with a note on *stare decisis*. Petitioner states that, in considering whether *Auer* should stand, the doctrine of *stare decisis* "applies with appreciably less force" and that "it is not clear that stare decisis applies at all in the context of 'deference regimes'" such as *Auer*. Brief for Petitioner 47, 49 (internal quotation marks and citation omitted); see generally *id.* 47–55. Again, *Amici* do not express a view on this point as applied to *Auer*. But they submit that the same claim cannot be made if *Chevron*'s continued viability is at stake.

A strong historical pedigree supports the concept underlying *Chevron*—that Congress may enact laws that set boundaries for agency action while permitting executive officers to fill the gaps. Several examples of what we would now call delegation can be seen in the earliest days of the Republic. For instance, the Postal Act of 1792 gave the Postmaster General broad discretion to determine "where to set up post offices," and "full authority to contract for the carriage of mail by whatever devices he thought 'most expedient.'" Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations*, 1787–1801, 115 Yale L.J. 1256, 1294 (2006); *ibid.* ("Congress made broad delegations of authority in a host of other statutes.").

The courts found nothing untoward. Instead, "[m]andamus and injunction actions seeking to review administrative interpretation of law in connection

with the denial of pensions, land grants, and other largess were frequently barred by the rule that these remedies reached only the violation of plain, nondiscretionary administrative duties." Monaghan, *supra*, at 16; *see also id.* ("History, if not logic, is thus squarely against the . . . assertion . . . that article III courts can never yield to administrative constructions of law."). Thus, while *Chevron* clarified the circumstances in which agencies may establish binding policy in recognition of the complexity of modern regulatory statutes, it followed long-standing practice.

The historical pedigrees of *Chevron* and *Auer* are quite distinct. See *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring) ("[T]he rule of *Chevron* . . . at least was in conformity with the long history of judicial review of executive action, where '[s]tatutory ambiguities . . . were left to reasonable resolution by the Executive.' I am unaware of any such history justifying deference to agency interpretations of its own regulations." (quoting *Mead*, 533 U.S. at 243 (Scalia, J., dissenting))).

Finally, it would be error to conclude that overturning *Chevron* would not significantly unsettle expectations. *Chevron* reflects the foundational notion that Congress may delegate certain tasks of subsidiary administrative policy to agencies. That is a principle of law that the public and Congress have long held to, and one that the Court should not lightly disturb.

CONCLUSION

The Court's ruling in this case should respect the fundamental differences between *Chevron* and *Auer* deference. *Chevron* deference, properly applied, is an important and structurally sound principle that should not, and need not, be placed in doubt if this Court overrules or modifies *Auer* deference.

Respectfully submitted,

SAMUEL ESTREICHER
NYU SCHOOL OF LAW
40 Washington Sq. So.
New York, NY 10012
(212) 998-6226

DAVID L. NOLL
RUTGERS LAW SCHOOL
123 Washington St., 303C
Newark, NJ 07102

VINCENT LEVY
Counsel of Record
DANIEL M. SULLIVAN
GREGORY DUBINSKY
EVAN H. STEIN
HOLWELL SHUSTER
& GOLDBERG LLP
425 Lexington Avenue
New York, NY 10017
(646) 837-5151
vlevy@hsgllp.com

Counsel for Amici Curiae

January 31, 2019

Appendix

APPENDIX*

Amici consist of the following professors:

1. William D. Araiza is Professor of Law at Brooklyn Law School. He teaches and writes extensively on administrative and constitutional law, and is the author of textbooks, articles, and academic monographs on these topics.

2. Michael Asimow is Visiting Professor of Law at Stanford Law School and UCLA School of Law, and a co-author of State and Federal Administrative Law (4th ed., 2014).

3. Marshall Breger is Professor of Law at Columbus School of Law, The Catholic University of America. A former Chair of the Administrative Conference of the United States and former Solicitor of Labor, he has taught administrative law for more than twenty-five years.

4. William W. Buzbee is a Professor of Law at Georgetown University Law Center. He teaches administrative law, legislation and regulation, and environmental law. Among his articles and books are Preemption Choice (2009 and 2011); Fighting Westway (2014) and the Environmental Protection: Law and Policy (co-author of 5th through 8th editions).

---

* Institutional affiliations are noted only for the purpose of identification. This brief does not purport to represent the views of any person or institution other than *Amici*.

5. Bryan T. Camp is George H. Mahon Professor of Law at Texas Tech University School of Law. He teaches and writes in the areas of administrative law, civil procedure, and taxation. He is an elected member of the American Law Institute.

6. Samuel Estreicher is Dwight D. Opperman Professor of Law, Director of the Center for Labor and Employment Law, and Co-Director of the Institute of Judicial Administration at New York University School of Law, and a co-author of Legislation and the Regulatory State (2d ed. 2017).

7. William Funk is Lewis & Clark Distinguished Professor of Law, Emeritus at Lewis & Clark Law School. He is the author of American Constitutional Structure and a co-author of Administrative Procedure and Practice: Problems and Cases and the Federal Administrative Procedure Sourcebook.

8. Jerry L. Mashaw is Sterling Professor of Law Emeritus and Professorial Lecturer at Yale University, and three-time winner of the annual scholarship award of the ABA Section of Administrative Law and Regulatory Practice. His latest book, which contains a discussion of the democratic foundation for the *Chevron* doctrine, is Reasoned Administration and Democratic Legitimacy: How Administrative Law Supports American Democracy (2018).

9. Nina A. Mendelson is the Joseph L. Sax Collegiate Professor of Law at the University of Michigan Law School, where she teaches administrative law and statutory interpretation; she also serves as a senior fellow of the Administrative Conference of the United States.

10. Joel A. Mintz is Professor of Law Emeritus and C. William Trout Senior Fellow in Public Interest Law at Nova Southeastern University College of Law. He has taught courses related to regulation and administrative law for thirty-six years and is an elected member of the American Law Institute.

11. David L. Noll is Associate Professor of Law at Rutgers Law School. He teaches and writes in the areas of legislation, regulation, civil procedure, and complex litigation, and is a co-author of Legislation and the Regulatory State (2d. ed. 2017).

12. Richard Stewart is University Professor and John E. Sexton Professor of Law at NYU School of Law. He was formerly Byrne Professor of Administrative Law at Harvard Law School and Assistant Attorney General for Environment and Natural Resources in the United States Department of Justice.

13. Peter L. Strauss is Betts Professor of Law Emeritus at Columbia Law School, where he teaches administrative law, legal methods, and

legislation. Among his many writings on federal administrative law are Gellhorn and Byse's Administrative Law, Cases and Comments (12th ed. 2017) and Administrative Justice in the United States (3d ed. 2016).

14. Jeff Thaler is Visiting Associate Professor, Maine Law School. He is a long-time litigator of regulatory and agency issues, and has created and taught new courses in Maine on legislative and administrative law, as well as an unique skills-building course on administrative proceedings in a simulated development project.